

# 2021 ADVANCED DUI TRIAL ADVOCACY

September 20 – September 22, 2021  
Phoenix, Arizona



**Tuesday, September 21, 2021**

## **Trying a Marijuana DUI Case**

Presented by:

**Jared Johnson**

Prop 207 TSRP, City of Scottsdale and GOHS

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL  
3838 N. Central Ave, Suite 850  
Phoenix, Arizona 85012

ELIZABETH BURTON ORTIZ  
EXECUTIVE DIRECTOR



1

---

---

---

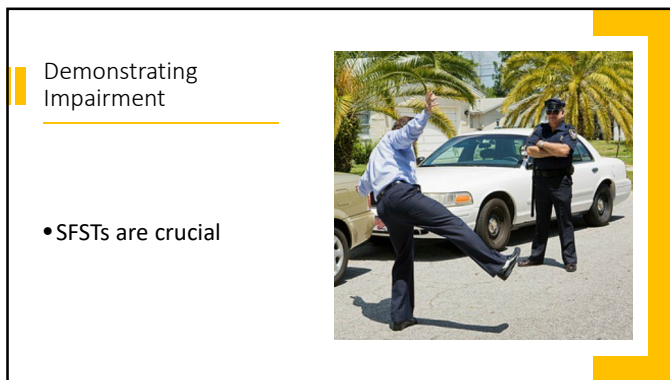
---

---

---

---

---



2

---

---

---

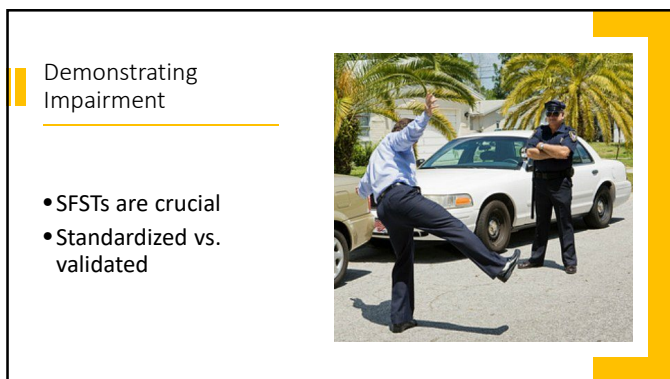
---

---

---

---

---



3

---

---

---

---

---

---

---

---

### Demonstrating Impairment

- SFSTs are crucial
- Standardized vs. validated
- Bodycams



4

---

---

---

---

---

---

---

### Demonstrating Impairment

- Modified Romberg



5

---

---

---

---

---

---

---

### Demonstrating Impairment

- Modified Romberg
  - Estimate the passage of 30 seconds
  - Observation of tremors
  - Observation of Sway



6

---

---

---

---

---

---

---

### Demonstrating Impairment

- Modified Romberg
  - Instruction stage
  - Balancing stage



7

---

---

---

---

---

---

---

---

### Demonstrating Impairment

- Modified Romberg
  - Stand straight with feet together and arms down at sides
  - Ask them to hold this position



8

---

---

---

---

---

---

---

---

### Demonstrating Impairment

- Modified Romberg
  - When officer tells them, tilt head back slightly and close eyes
  - Estimate the passage of 30 seconds



9

---

---

---

---

---

---

---

---

### Demonstrating Impairment

- Modified Romberg
  - Amount, direction and degree of sways
  - Actual time that passed (~30 seconds)
  - Body or eye tremors



10

---

---

---

---

---

---

---

### Demonstrating Impairment

- Finger to Nose



11

---

---

---

---

---

---

---

### Demonstrating Impairment

- Finger to Nose
  - Stand with feet together, arms at sides, face examiner
  - Told to extend index finger
  - Asked to touch tip of finger to tip of nose



12

---

---

---

---

---

---

---

### Demonstrating Impairment

- Finger to Nose
  - Officer will demonstrate
  - Officer will tell them left or right to indicate which finger to use



13

---

---

---

---

---

---

---

### Demonstrating Impairment

- Finger to Nose
  - Return arm to side immediately after touching
  - Head tilted back during test



14

---

---

---

---

---

---

---

### Demonstrating Impairment

- Finger to Nose
  - Return arm to side immediately after touching
  - Head tilted back during test



15

---

---

---

---

---

---

---



### Demonstrating Impairment

- Finger to Nose
  - Test will be L,R,L,R,R,L
  - 3 or more misses significant for marijuana impairment (Hartman 2016 study)



16

---

---

---

---

---

---

---

---

### Attacks on SFST

- Yes it was validated on ETOH



17

---

---

---

---

---

---

---

---

### Attacks on HGN

- Yes it was validated on ETOH
- But validated to show impairment



18

---

---

---

---

---


---

---

---

Attacks on HGN & SFST

- Yes HGN was validated on ETOH
- But validated to show impairment
- SFSTs were included in the DRE studies and validated for 7 drug categories.



19

---

---

---

---

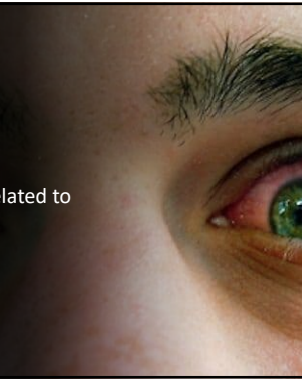
---

---

---

Observations

- HGN not usually present
- Walk and Turn cues highly correlated to MJ use



20

---

---

---

---

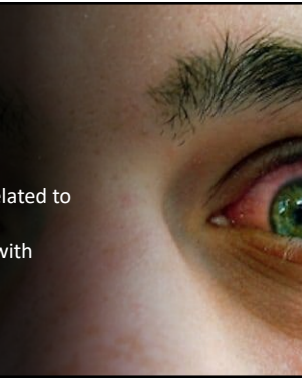
---

---

---

Observations

- HGN not usually present
- Walk and Turn cues highly correlated to MJ use
- OLS less reliable, many people with active THC show 1 cue or less.



21

---

---

---

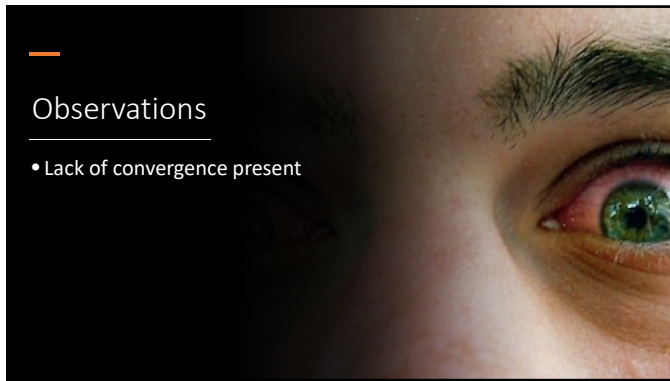
---

---

---

---





22

---

---

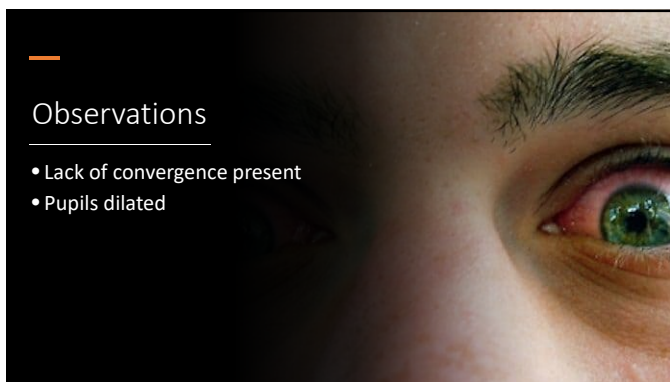
---

---

---

---

---



23

---

---

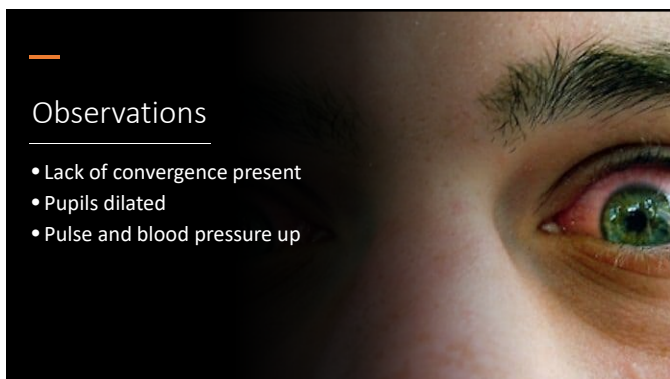
---

---

---

---

---



24

---

---

---

---

---

---

---

## Observations

- What you won't see
  - HGN and VGN (usually)
  - Changes in reaction to light
  - Changes in body temperature



25

---

---

---

---

---

---

---

---

## Cannabis Studies

- Drug Recognition Expert (DRE) Examination Characteristics of Cannabis Impairment, Rebecca L. Hartman, et al (July 2016)



26

---

---

---

---

---

---

---

---

## Cannabis Studies

- Drug Recognition Expert (DRE) Examination Characteristics of Cannabis Impairment, Rebecca L. Hartman, et al (July 2016)
- Results – Finger to nose with over three misses is the best indicator! Eyelid tremors alone an 86.1% predictor.



27

---

---

---

---

---

---

---

---

## Cannabis Studies

- Recommended FST's for cannabis Impairment
- FTN with three or more misses
- Eyelid tremors present
- OLS sway
- WAT 2 cues
- 2 of the 4 or more equals impairment



28

---

---

---

---

---

---

---

---

## Cannabis Studies

- *Cannabis Effects on Driving Skills*, Hartman, Huestis et.al., Clinical Chemistry (2013)
  - *Cannabis increases risk of accidents taken alone and combining alcohol with cannabis strongly enhances impairment, especially lane weaving.*



29

---

---

---

---

---

---

---

---

## Drug Recognition Expert (DRE)

- DRE trained officers have been on the decline



30

---

---

---

---

---

---

---

---

## Drug Recognition Expert (DRE)

- DRE trained officers have been on the decline
- New emphasis on DRE officers for MJ



31

---

---

---

---

---

---

---

---

## Drug Recognition Expert (DRE)

- DRE trained officers have been on the decline
- New emphasis on DRE officers for MJ
- DUI Training
  - Academy
  - HGN
  - ARIDE
  - DRE
  - DRE Instructor



32

---

---

---

---

---

---

---

---

## Drug Recognition Expert (DRE)

- "A process of systematically examining a person suspected of being under the influence of a drug, for the purpose of ascertaining what category of drugs (or combination of categories) is causing that person's impairment. A trained DRE can identify, with a high degree of reliability, the distinguishing signs and symptoms of seven broad categories of drugs."



33

---

---

---

---

---

---

---

---

## Drug Recognition Expert (DRE)

- DRE Officers are Experts



34

---

---

---

---

---

---

---

## Drug Recognition Expert (DRE)

- DRE Officers are Experts
- If you are getting resistance from the judge qualifying your DRE as an expert, you should rely on the big three studies



35

---

---

---

---

---

---

---

## Drug Recognition Expert (DRE)

- #1 John Hopkins Study (Bigelow) 1985
- NHTSA evaluated the LAPD preliminary DRE program
- Given 15 minutes, the trained DRE had to determine if a person was impaired by drugs and the category
- DRE's were found to be over 90% accurate



36

---

---

---

---

---

---

---

## Drug Recognition Expert (DRE)

- #2 173 Case Study 1985
- NHTSA field validation study of LAPD
- 94% of the time an arrest was made using DRE techniques a drug other than alcohol was detected by lab analysis



37

---

---

---

---

---

---

---

---

## Drug Recognition Expert (DRE)

- #3 The Arizona Study
- 1994 DRE validation study
- Validated the Reliability of the DRE examinations
- Contains good statistics regarding the detection of drivers using marijuana/cannabis



38

---

---

---

---

---

---

---

---

## DRE Uses

- Fact Witness
  - Did a DRE or some portion of the investigation
- Cold Expert
  - They can be called to educate your jury
- Expert Opinion
  - Can they testify as to an opinion on impairment?



39

---

---

---

---

---

---

---

---



## DRE Expert Opinion

### Rule 704:

- (a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.



40

---

---

---

---

---

---

---

---

## DRE Expert Opinion

### Rule 704:

- (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a **mental state or condition** that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.



41

---

---

---

---

---

---

---

---

## DRE Expert Opinion

### *Fuenning* 139 Ariz. 590

- Frequently misused
- Most language cited by defense in *dicta*
- This case and *Bedoni* (161 Ariz. 480) both support eliciting DRE testimony that Defendant's conduct appeared influenced by drugs.



42

---

---

---

---

---

---

---

---

## DRE Expert Opinion

Fuenning 139 Ariz. 590

- Limit appears to be “influenced by”.
- Asking about whether the Defendant was “impaired” may get you sustained objection or worse, a mistrial.



43

---

---

---

---

---

---

---

---

## DRE Uses

- Meet with your DRE ahead of time



44

---

---

---

---

---

---

---

---

## DRE Uses

- Meet with your DRE ahead of time
- Have them educate you



45

---

---

---

---

---

---

---

---

## DRE Uses

- Meet with your DRE ahead of time
- Have them educate you
- Even if you don't entirely understand the DRE or its significance, make sure you know what questions to ask, your DRE will help you



46

---

---

---

---

---

---

---

---

## DRE Uses

- Meet with your DRE ahead of time
- Have them educate you
- Even if you don't entirely understand the DRE or its significance, make sure you know what questions to ask, your DRE will help you.
- Make sure your DRE is familiar with the studies you intend to use



47

---

---

---

---

---

---

---

---

## How to overcome challenges

- Emphasize signs of impairment

48

---

---

---

---

---

---

---

---

## How to overcome challenges

- Emphasize signs of impairment
  - Don't just tell, show if you can
  - Bad driving is the best evidence

49

---

---

---

---

---

---

---

## How to overcome challenges

- Emphasize signs of impairment
  - Don't just tell, show if you can
  - Bad driving is the best evidence

Chris Rock Rule

50

---

---

---

---

---

---

---

## How to overcome challenges

- Emphasize signs of impairment
  - Don't just tell, show if you can
  - Bad driving is the best evidence

Chris Rock Rule

- Don't left the defense take credit for something defendant was supposed to do

51

---

---

---

---

---

---

---

## How to overcome challenges

- Build your evidence in closing
  - If defendant didn't show these signs would officer have conducted a DUI investigation
  - What about DUI investigation made officer decide to arrest
  - What about DRE led officers to believe defendant was under influence of MJ
  - Finally, did labs confirm officers were right?
- In short, don't let them divide and conquer your evidence

52

---

---

---

---

---

---

---

---

## How to overcome challenges

- DRE Matrix
  - Talk to your case agents about any inconsistencies between the expected and actual signs of impairment
  - Be prepared to address those inconsistencies
    - Poly-drug use
    - Coming down off the drug

53

---

---

---

---

---

---

---

---

## How to overcome challenges

- DRE under Daubert
  - Every appellate court that has considered DRE have upheld DRE protocols. *See State v. Daly*, 278 Neb. 903 (Neb. 2009) for a list of those opinions.
  - Rule 702 – Does not apply to the majority of DRE protocol just like other SFSTs. *See State v. Superior Court (Blake)*, 149 Ariz. 269 (1986).

54

---

---

---

---

---

---

---

---



---

---

---

---

---

---

---